

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD HUGH WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

December 22, 2011

No. 300626

Oakland Circuit Court

LC No. 2010-232972-FH

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of larceny in a building, MCL 750.360. Defendant was sentenced for this conviction, as a forth habitual offender, MCL 769.12, to 3 to 15 years. We affirm.

Defendant stole a 32 inch television from a hotel room and was caught on video surveillance leaving the hotel with this television. The following day, an employee from the hotel reported seeing a person that resembled the thief as seen in the video. Officer Jill Becker responded on both days.

Defendant argues that the prosecution improperly vouched for Officer Becker's credibility in its closing arguments, and therefore, deprived defendant of a fair and impartial trial. We disagree.

Since defendant failed to object contemporaneously to the alleged misconduct and request a curative instruction, this Court reviews for plain error. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). In reviewing for plain error, "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). This Court "will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006).

In reviewing for prosecutorial misconduct, this Court must determine "whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Defendant bears the burden to show that the alleged prosecutorial

misconduct resulted in a miscarriage of justice. *Brown*, 279 Mich App at 134. “A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely curative instruction.” *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). Issues of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Further, “[p]rosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *Brown*, 279 Mich App at 135.

Defendant argues that the prosecution improperly vouched for Officer Becker’s credibility in its closing argument, and since the prosecution’s case rested mainly on this testimony, this misconduct deprived defendant of a fair trial. We disagree. Prosecutors may not vouch for the credibility of their witnesses to the effect that the prosecution has special knowledge regarding the truthfulness of the witness testifying. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Nevertheless, a prosecutor may argue from the facts in evidence that a witness is worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). A prosecutor may also respond to issues raised by defense counsel. *Brown*, 279 Mich App at 135. Improper conduct or remarks may not require reversal if they address issues raised by defense counsel. *Dobek*, 274 Mich App at 64.

Here, the record shows that defense counsel questioned the credibility of Officer Becker’s testimony in his closing argument. In response, the prosecution argued that Officer Becker had no motive to overstate or inflate her testimony. Specifically, defendant argues that the prosecution vouched for Officer Becker’s testimony when it stated Officer Becker would not “place her reputation and her career on the stand in order to come in and overstate something on a larceny from a hotel case. It’s just not gonna happen [sic].” In this comment, the prosecution did not assert that it held special knowledge concerning Officer Becker’s credibility. The prosecution may have asserted its conclusions about Officer Becker’s credibility in rebutting defense counsel’s assertion that Officer Becker was not credible but it did not vouch for Officer Becker’s testimony. As permitted, the prosecution argued from facts on the record regarding whether Officer Becker was worthy of belief. *Howard*, 226 Mich App at 548. During closing arguments, a prosecutor may comment on his own witnesses’ credibility, “especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes.” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). After defense counsel asserted that Officer Becker lacked credibility, the prosecution argued that a veteran officer accustomed to conducting investigations, without any motive or bias revealed at trial, would have no motivation to overstate her observations.

Defendant’s arguments are further undermined when reviewing the prosecution’s comments within context of the prosecution’s closing arguments. The record shows that after making these alleged inappropriate comments, the prosecution encouraged the jurors to review Officer Becker’s overall testimony and demeanor while testifying in making their credibility assessments. The prosecution underscored that the jurors themselves had to make their own credibility decisions, thereby insinuating that the prosecution’s personal belief about Officer Becker’s credibility was irrelevant. We conclude that the prosecution did not engage in prosecutorial misconduct by rebutting defense counsel’s attacks on Officer Becker’s credibility.

The record shows that on at least two occasions, the trial court instructed the jury that the statements made by the prosecution and defense counsel should not be considered evidence. Further, the trial court emphasized that it was within the purview of the jury to determine credibility and illustrated various ways in making a credibility decision. We conclude that there was no manifest injustice and, accordingly, no error requiring reversal.

Next defendant argues that defense counsel seriously prejudiced defendant's trial by failing to use "reasonable professional judgment" in representing defendant. We disagree. Since defendant failed to move for an evidentiary hearing on this issue, we confine our review to "errors apparent on the record." *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). An ineffective assistance of counsel claim "is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.*

To justify reversal of a conviction on grounds of ineffective assistance of counsel, a defendant must show that defense counsel's performance was deficient and that such deficiencies prejudiced defendant's case. *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008). Defendant must show that "counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). We presume that defendant received effective counsel and place a heavy burden on defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Defense counsel is given wide latitude on matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Further, this Court will not substitute its judgment for that of defense counsel or review the record with the added benefit of hindsight on matters of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant argues that defense counsel was ineffective for failing to challenge certain jurors, failing to ask the jury to find defendant "not guilty" and failing to object to the prosecutors closing argument. We disagree. We are reluctant to substitute our judgment for that of defense counsel, especially on the basis of a defense counsel's failure to challenge a juror. *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008), since "[p]erhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions," and as a reviewing Court, we are unable observe or listen to jurors as they respond to voir dire questions. *Id.* Defense counsel, however, does have the opportunity to make such observations, which provides a valid basis for jury selection. See *Id.* Decisions regarding what to emphasize in closing arguments are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Upon reviewing the record, it appears that defense counsel's strategy focused on emphasizing the high burden that the prosecution had to meet to establish defendant's guilt. The record also shows that defense counsel highlighted in both his opening statement and closing argument the high standard of proof that the jury had to apply in determining whether the prosecution met its burden. And, finally, defense counsel's decision to not "raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App 210. As concluded by this Court, the prosecution's comments were not improper, and therefore, an objection to proper comments would be futile, which by definition, is not ineffective. *Thomas*, 260 Mich App at 457. Thus, we reject defendant's argument that his counsel was ineffective.

Defendant next challenges the sufficiency of the evidence, essentially regarding the identification of the defendant as the perpetrator. In reviewing a sufficiency of the evidence challenge, this Court reviews the record de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). This Court will affirm a conviction if it is determined, in reviewing the evidence in a light most favorable to the prosecution, that the jury could have found that the elements of the crime were proved beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). In reviewing the record, this Court is "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is irrelevant whether the evidence is direct or circumstantial, the same deferential standard is applied. *Id.* As such, the prosecution can establish the elements of a crime from circumstantial evidence and reasonable inferences arising therein. *Id.* Furthermore, should any conflict arise, this Court should resolve such conflicts in favor of the prosecution. *Wilkens*, 267 Mich App at 738. The positive identification of a defendant by a witness may be sufficient to sustain a conviction. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). This Court defers to the trier of fact's determination as to the credibility of the identification testimony. *Id.*

There is sufficient identification evidence for a reasonable jury to conclude that the prosecution proved beyond a reasonable doubt that defendant committed this larceny. The record shows that the hotel's surveillance videotaped an individual carrying a television down the stairs and through the exit. The same individual appeared at the same hotel, notably wearing the same clothing, the next day. After Officer Becker watched the surveillance video of the larceny, she was notified that the same individual reappeared. The jury could have relied on Officer Becker's testimony and the surveillance footage, which was admitted as evidence and played for the jury and reviewed by this Court, in concluding that defendant committed larceny. Defendant's face was clearly visible on the surveillance video and the jury had an independent opportunity to compare the video with the defendant in court. We conclude that this constitutes sufficient evidence for a reasonable jury to find that the prosecution proved beyond a reasonable doubt that defendant is guilty of larceny in a building.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause